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In The
Supreme Court of the United States

JOSEPH DANIELS, a/k/a Lil Hawk,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DID THE FOURTH CIRCUIT INCORRECTLY FIND JOSEPH DANIELS SIXTH AMENDMENT RIGHT TO A JURY TRIAL WAS NOT VIOLATED BY THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON DRUG QUANTITY, AN ELEMENT OF THE OFFENSE UNDER 21 U.S.C. §841, IN CONFLICT WITH A DECISION OF THE SECOND CIRCUIT?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2002

JOSEPH DANIELS, a/k/a LIL HAWK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Joseph Daniels asks this Court to review the decision of the United States Court of Appeals for the Fourth Circuit, rendered on 21 June 2002 and made final on 19 July 2002, that upheld a conviction obtained without a jury finding of drug quantity, an element of the offense under 21 U.S.C. §841, in violation of the Sixth Amendment. *See, e.g., Ring v. Arizona*, 122 S.Ct. 2428, 2439, 2443 (2002); *Jones v. United States*, 526 U.S. 227, 249-52 (1999). This decision is in conflict with *United States v. Thomas*, 274 F.3d 655 (2nd Cir. 2001)(en banc), on this constitutional question. Thus, certiorari review is in order. *See Northeastern National Bank v. United States*, 387 U.S. 213, 217 (1967)(granting certiorari to resolve conflict between circuits).

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unpublished and is reproduced in the Appendix. [App. A 1-8]

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the district court's judgment was entered on 21 June 2002, before this Court's decision in *Ring v. Arizona*, 122 S.Ct. 2428 (2002).[1] [App. A 1-8] The lower court denied petitioner's request for rehearing and rehearing en banc on 19 July 2002. [App. B 1-2] The question of whether, under 21 U.S.C. §841, a defendant may be subjected to increased statutory penalties based on an element of the offense-drug quantity-that is determined only by the sentencing judge, not by the jury, and not based on proof beyond a reasonable doubt was presented to the Fourth Circuit and decided on the merits. [App. A 6-8] This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

U.S. Const. amend VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of

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[1] *Ring* was decided on 24 June 2002. Daniels was convicted on 27 January 1999, before this Court decided *Jones* on 24 March 1999. An inordinate delay in preparation of the trial transcripts, through no fault of Daniels, prevented his appeal from moving forward for a substantial time.

the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense".

U.S.C. §841 is reproduced in the Appendix. [App. E 1-13]

STATEMENT OF THE CASE

A grand jury indicted Joseph Daniels for conspiracy to distribute non-specific amounts of cocaine base (crack) and cocaine hydrochloride. *See* 21 U.S.C. §§841(a); 846. The indictment did not allege drug quantity. [App. C 1-3] The matter came on for trial before a jury. At the close of the government's case and at the close of all the evidence, the district court denied motions to dismiss. Fed. R. Cr. P. 29. The district court instructed the jury in general terms regarding conspiracy and did not require the jury either to specify the type of drugs or to find the specific amount of drugs involved in the conspiracy. The jury returned a general verdict finding Daniels guilty of conspiring to distribute an unspecified amount cocaine on 27 January 1999, two months before the decision in *Jones v. United States*, 526 U.S. 227 (1999).

At sentencing on 15 June 1999, Daniels disputed the drug quantity attributed to him. Recognizing this objection by Daniels, the district court chose to rely on the testimony of one witness, Milton Jones, who said he made a trip to New York and obtained two kilograms of cocaine for Daniels. During his return, Jones was stopped by police, who seized this cocaine. However, the chemist who tested this cocaine found it weighed less than 1.5 kilograms. Nevertheless, the district court relied on this evidence and imposed a sentence of 292 months based on a finding-neither charged in the indictment, found by the jury, nor proved beyond a reasonable doubt-that the drug conspiracy involved a quantity of crack cocaine in excess of 1.5

kilograms. Daniels timely appealed on 18 June 1999, long before the decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Fourth Circuit affirmed, rejecting Daniels' claim that his conviction and sentence violated *Apprendi*, purportedly because Daniels could not show plain error. *Contra United States v. Thomas*, 274 F.3d 655, 669-71 (2nd Cir. 2001). Daniels sought rehearing and rehearing en banc that were denied on 19 July 2002.

STATEMENT OF THE FACTS

Joseph Daniels, a licensed bail bondsman and surety, was indicted on federal drug charges allegedly involving a conspiracy with Lonnie Earl Crandall. Because of his position bonding many people charged with narcotics violations, Daniels often was in the area of Washington, North Carolina where drug activities occurred. Most of his business dealings were in cash. He also had telephone and pager numbers which were well-known to many people. People would call him constantly; he would immediately return these calls; he frequently called many people to decide whether to bail a person out of jail and to find a person for court appearances. In fact, Daniels posted a bond for Lonnie Crandall.

Aside from being well-known in the area because of his profession, Daniels was widely known because he had grown up in Washington, North Carolina; lived there all his life; and starred on his high school basketball team. Most of the people who testified and implicated Daniels had known him for many, many years.

Crandall, who was charged in the conspiracy with Daniels, claimed they had begun dealing drugs together in the 1990s. Crandall described a trip he took to New York. On this trip, he purchased crack for himself and Daniels. Crandall also claimed he and Daniels paid for two cruises with money they made from selling crack, a claim hotly contested by Daniels, his girlfriend (Tiwana Spruill), and

several others. According to Crandall, Daniels kept drugs in a cabinet at Tony Boston's house because he did not want his girlfriend to find out about the drugs. Spruill is a state probation officer.

Crandall, who Crandall pled guilty to the conspiracy and was waiting to be sentenced, also claimed Daniels recruited Milton Jones to make several trips for them. The police contacted him about testifying against Daniels. In his first two interviews with law enforcement, Crandall did not mention Daniels. Crandall did not mention Daniels in a second statement he made to the police. Crandall admitted he lied to his probation officer and to the police.

Several other people implicated Daniels in exchange for sentencing considerations. Most of them did not mention Daniels when first interviewed by police. Several had been incarcerated with other informers before they ever mentioned Daniels to investigators. Many knew Lonnie Crandall and bought crack from him. They often met Daniels in Washington, who gave them business cards identifying himself as a bondsman.

Milton Jones met Daniels through Daniels's brother, Calvin Daniels. Calvin and Jones worked together. According to Jones, Daniels asked Jones to drive to New York to bring cocaine back to North Carolina. Daniels was at Lonnie Crandall's house when Jones left for New York. Jones drove to a specified location in New York, where cocaine was placed in the stash location. He returned to Crandall's house. Daniels was there; the cocaine was taken out of the car.

Jones claimed they later bought a van because it had a bigger compartment for carrying money and drugs. The van was titled in his name. During a final trip to New York, Jones was stopped coming back in New Jersey. Police impounded the van. When they tore it apart, they found

cocaine. Jones told police the police the drugs belonged to George Marshall. He admitted he did not mention Daniels when police arrested him in New Jersey. A New Jersey chemist examined the cocaine drugs seized in the van Jones was driving, which weighed 1483.8 grams.

The government introduced numerous telephone records. These showed many calls between Lonnie Crandall and Daniels. Agents began investigating Lonnie Crandall in 1996, but had never seen Daniels with crack or powder cocaine, large sums of money, or nice cars. Crandall was arrested after making controlled buys in 1998 with large amounts of cocaine. Daniels's name was never mentioned. Agents never saw drugs being delivered from Crandall to Daniels. There were no pictures, recordings, video tapes, or money connecting Daniels and Crandall. Furthermore, most of the informants who testified against Daniels did not mention him when they were first interviewed. When law enforcement officers searched Daniels's apartment, Tiwana Spruill, his girlfriend, met them at the door. There were no drugs, drug paraphernalia, or illegal substances in the apartment.

Eddie Gorham had known Daniels most of his life and lived near him. He saw Daniels most days, and they often played basketball together. Gorham worked with Milton Jones, who played basketball as well. Gorham often saw Daniels and Jones together, but they were never doing anything illegal. Gorham saw no indication Daniels was involved in the drug business. Gorham frequently rode with Daniels on his bond business, helping him collect money in tough neighborhoods. Crandall also rode with them and helped Daniels in some of the rougher neighborhoods.

Daniels's mother, Mary Daniels, explained Daniels rarely had large amounts of money. With respect to the cars the government claimed Daniels owned, Mary co-signed

loans that enabled Daniels to purchase the Infiniti and the Ford Expedition. Various papers were introduced corroborating her testimony regarding the loans taken on these cars and her co-signing them. She provided documents showing she and her husband, Joe Boston, made payments on these vehicles. Eventually Daniels's brother, Calvin Daniels, bought the Infiniti back from the credit union. Calvin corroborated her testimony regarding the Infiniti. He borrowed $10,000.00 to buy the car back from the bank.

Daniels had lived most of his life in Washington. He graduated from high school where he was an all-conference basketball player. After working at various jobs, he eventually earned his license as a bail bondsman and surety bondsman. He began to work with his father in 1993. Daniels did not obtain a cellular telephone or pager until 29 July 1993. These items were purchased on his father's business account.

Daniels explained some of the basics of the bail bond business. Generally the business transactions were done in cash. The typical fee was fifteen percent of the bond. Daniels had business cards and various advertisements with all of his telephone and pager numbers on them. Daniels had never been disciplined with regard to his bonding activities. Various state officials corroborated Daniels's good standing with regard to his bail and surety bonding. Daniels had known Lonnie Crandall since high school. Crandall often worked for him in bail bonding activities. Daniels's father, Joe Boston, corroborated this testimony that Crandall did work informing for them. Daniels identified several pictures taken of him and his girlfriend, Tiwana Spruill, as well as Crandall and his girlfriend, and Daniels's brother and his wife while they were on a cruise. This cruise involved a large group from Daniels's church. There were no drugs involved. Daniels paid for the cruise by depositing $100.00 per month for over a year. He did not

use drug money for this or any other cruise. Daniels introduced various records from the bonding business. From late 1995 to early 1997, he collected nearly $80,000.00 in bond fees. During 1997, he collected over $100,000.00 in bond fees. In the first half of 1998, he collected almost $65,000.00 in bond fees. These transactions were in cash.

Spruill, a graduate of Elizabeth City State University, met Daniels while she was working at the local boys club. She was the athletic director and Daniels often volunteered there. They started dating in 1994. Spruill knew Daniels was a bail bondsman. He received lots of pages and telephone calls. Spruill lived with Daniels at the time of his arrest. Police found no drugs found. She was not aware of any drug dealing involving Daniels, and he was never gone for long periods of time.

Willie Johnson, whom Crandall claimed had been involved in drug activities with him and Daniels, admitted he twice drove to New York on drug deals for Crandall. Crandall never mentioned Daniels to Johnson. Johnson also knew Milton Jones. Jones never mentioned Daniels to him. He never saw Daniels with drugs.

Manner In Which The Federal Question Was Raised And Decided Below

Joseph Daniels was convicted and sentenced to an increased term in excess of the statutory maximum for a cocaine conspiracy based upon a quantity determination not submitted to the jury or proved beyond a reasonable doubt. Daniels was convicted on 27 January 1999, two months before this Court decided *Jones v. United States* on 24 March 1999. His sentence was imposed on 19 June 1999, a week before this Court decided *Apprendi v. New Jersey* on 26 June 2000. Daniels challenged his conviction and sentence on appeal based on *Jones* and *Apprendi*. The United States Court of Appeals for the Fourth Circuit placed his appeal in

abeyance pending its decision in *United States v. Promise*, 255 F.3d 150 (4th Cir. 2001)(en banc), *cert. denied*, 122 S.Ct. 2296 (2002). The court below rejected this claim on the merits, in a decision conflicting with the holding in *United States v. Thomas*, 274 F.3d 655, 668-72 (2d Cir. 2001)(en banc),[2] and recognized an *Apprendi* error. But it held Daniels had not challenged the drug quantity at sentencing to the extent the quantity was less than 1.5 kilograms, despite the district court's explicit reliance on the testimony of one witness who mistakenly claimed to have obtained two kilograms of cocaine for Daniels.[3] Thus, the federal constitutional claim was raised and decided on the merits below.

REASONS THE WRIT SHOULD ISSUE

THE FOURTH CIRCUIT INCORRECTLY HELD JOSEPH DANIELS' SIXTH AMENDMENT RIGHT TO A JURY TRIAL WAS NOT VIOLATED BY THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON DRUG QUANTITY, AN ELEMENT OF THE OFFENSE UNDER 21 U.S.C. §841, IN CONFLICT WITH A DECISION OF THE SECOND CIRCUIT.

The Sixth Amendment guarantee of trial by jury means any fact, other than a prior conviction, "that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 243

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[2] Because of the conflict between the circuits on the application of the Sixth Amendment to this issue, certiorari is appropriate.

[3] In fact, the expert testimony revealed this witness actually obtained less than 1.5 kilograms of cocaine, which was the basis for Daniels' challenge to the quantity the district court attributed to him.

n.6 (1999); *accord Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). Indeed, "[a] defendant may not be 'expose[d] to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.'" *Ring v. Arizona*, 122 S.Ct. 2428, 2439-40 (2002)(citation omitted). Most circuits have concluded that under 21 U.S.C. §841 drug quantity is an element of the crime. *See, e.g, United States v. Promise*, 255 F.3d 150, 156-57 & n.6 (4th Cir. 2001)(en banc), *cert. denied*, 122 S.Ct. 2296 (2002); *United States v. Staryhorn*, 250 F.3d 462, 468 (6th Cir. 2001); *United States v. Hishaw*, 235 F.3d 565, 574-75 (10th Cir. 2000), *cert. denied*, 533 U.S. 908 (2001); *United States v. Doggett*, 230 F.3d 160, 164-65 (5th Cir. 2000), *cert. denied*, 531 U.S. 1177 (2001); *United States v. Rogers*, 228 F.3d 1318, 1327 (11th Cir. 2000), *abrogated on other grounds by United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001)(en banc); *United States v. Norby*, 225 F.3d 1053, 1058-59 (9th Cir. 2000). If drug quantity is an element of the offense, then Joseph Daniels received a sentence that exceeded the maximum penalty for the offense of which the jury found him guilty. This case presents the opportunity to clarify the lower courts' role in applying constitutional requirements to federal criminal statutes, to further define the limits to the legislature's power to create sentencing factors, and to answer the constitutional questions left open in *Jones*, *Apprendi*, and *Ring*.

An indictment must charge a specific quantity of a controlled substance if the prosecution seeks an enhanced sentence under 21 U.S.C. §841(b). *United States v. Cotton*, 261 F.3d 397, 403-07 (4th Cir. 2001), *rev'd on other grounds*, 122 S.Ct. 1781 (2002). Under *Cotton*, drug quantity must be treated as an element of an aggravated drug trafficking offense and the failure to allege a specific threshold quantity in the indictment and have the jury find this quantity beyond reasonable doubt violates the Sixth Amendment. *See Ring v. Arizona*, 122 S.Ct. at 2439-40. Where, as here, the district court does not charge the jury to find a specific

quantity of a controlled substance and the jury returns only a general verdict, a sentence can only be imposed under section 841(b)(1)(C). The maximum penalty under that provision is 240 months, significantly shorter than the sentence of 292 months the district court imposed on Daniels. Such a result constitutes plain error because sentencing Daniels to imprisonment for a term greater than that available under the facts found by the jury means he received a sentence for which he was neither charged or convicted. *United States v. Doe*, 297 F.3d 76,91-93 (2nd Cir. 2002); *Thomas*, 274 F.3d at 669.

One aspect of the district court's error in light of *Apprendi* involved its failure to instruct the jury on an element of the offense: the quantity of cocaine involved in this conspiracy. "The constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *United States v. Gaudin*, 516 U.S. 506, 522-23 (1995). Paraphrasing Justice Scalia's analysis in *Gaudin*, "The Constitution gives [Joseph Daniels] the right to demand that a jury find them guilty of all the elements of the crime with which he is charged; one of the elements in the present case is [drug quantity]; he therefore had a right to have the jury decide [drug quantity]." *Id.* at 511. Unquestionably, this right is of constitutional dimension. *See, e.g., Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993); *Patterson v. New York*, 432 U.S. 197, 210 (1977).

Nowhere did the district court tell the jury to determine the quantity of cocaine involved in the conspiracy charged in the indictment. Rather, the district court told the jury to find a conspiracy if defendant and some other person came to a mutual understanding to try to accomplish a common and unlawful plan as charged in the indictment and became a member of the conspiracy. [App. D-6] Specifically, the court told the jury defendant did not need full knowledge of the details of the unlawful plan.

> [B]ecause the essence of the conspiracy offense is the making of the scheme itself, it is not necessary for the Government to prove that the conspirators actually succeeded in accomplishing their unlawful plan. What the evidence in the case must show beyond a reasonable doubt is, the following two things. One, that 2 or more persons in some way or manner came to a mutual understanding to try to accomplish a common and unlawful plan as charged in the indictment. And, second, the defendant knowingly and willfully became a member of that conspiracy.
>
> A person may become a member of the conspiracy without full knowledge of all of the details of the unlawful scheme or the names and identities of all of the other alleged conspirators. So if a defendant has an understanding of the unlawful nature of the plan and knowingly and willfully joins in that plan on one occasion that is sufficient to convict him for conspiracy even though he had not participated before and even though he may have played only a minor role.

[App. D-6] Hearing these directions, no reasonable juror could have believed the quantity of drugs was even remotely significant.

More importantly, the verdict form did not require a finding of drug quantity. It only sought the jury's finding of whether Joseph Daniels was guilty or not guilty of the crime

charged in the indictment.[4] The district court erred in failing to instruct the jury on the element of drug quantity as constitutionally required by *Apprendi*.

Apprendi worked a major change in the law regarding whether drug quantity is an element of a prosecution under section 841(b) that must be found by the jury beyond a reasonable doubt. The lower court had held to the contrary. *See United States v. Darlouis*, 107 F.3d 248, 252 (4th Cir. 1997). Thus, any request by Daniels for a jury instruction on this element "most assuredly would have been for naught." *United States v. David*, 83 F.3d 638, 646 (4th Cir. 1996). *David* found the failure to instruct on an element of an offense to be plain error that is cognizable and reversible on appeal in the absence of an objection. *Id.* at 647-48.

While a narrow reading of *Apprendi* would limit its holding to cases involving sentences above the statutory maximum for the offense of conviction, its holding also implicates the constitutionality of any legislative scheme which allows punishment to be handed down by a preponderance of the evidence. According to *Apprendi*, "the relevant inquiry here is one not of form, but of effect - - does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" In a statutory scheme where "a judge's finding based on a preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as "a tail which wags the dog of the substantive offense."

In applying the foregoing analysis, *Apprendi* went beyond ordering resentencing. Rather, it struck down New Jersey's statutory scheme as violating the foregoing

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[4] The district court did not explain the verdict form to or discuss it with the jury.

principles. Section 841 and the guidelines have the same constitutional defect. Both authorize dramatic increases in punishment, in real terms, by a preponderance of the evidence. Following *Apprendi*, they should be declared unconstitutional as well.

Daniels was charged with conspiring to distribute no specific quantity of cocaine. The jury was not told to find any quantity of cocaine, so the verdict only allowed the district court to sentence Daniels under section 841(b)(1)(C). Unquestionably, section 841(b)(1)(C) does not contain a mandatory punishment. Because it does not contain a mandatory sentence, a district court must impose a sentence within the guideline range when a specific drug quantity is not alleged in the indictment. *See Promise*, 255 F.3d at 156. A defendant must be sentenced in accordance with the guidelines where the quantity of the controlled substance is not submitted to the jury and proved beyond a reasonable doubt. The structure of section 841 leads to this result. Under section 841, subsection (a)(1) sets out the unlawful acts and subsection (b) prescribes the penalties. The latter provision establishes ascending penalties depending on the proof of certain facts including recidivism, whether death or serious bodily injury resulted, and the type and amount of drugs involved. No single maximum or mandatory minimum penalty is provided by section 841(b).

"[I]t is unconstitutional for legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 490 (*quoting Jones*, 526 U.S. at 252-53. This means the legislature cannot create a situation in which an enhanced sentence is applicable where the quantity of drugs necessary to trigger this enhanced sentence is neither alleged in the indictment nor found beyond a reasonable doubt. *United States v. Floyal*, 234 F.3d 932, 937-38 (6th Cir. 2000). Aggravating factors, other than a prior conviction, that increase the penalty from a lesser to a

greater sentence are now under *Apprendi* elements of the crime to be charged and proved. Any finding of a quantity of powder cocaine in excess of 500 grams increased the prescribed range of penalties to which Daniels was exposed and is subject to *Jones*, *Apprendi*, and *Ring*. In the absence of a jury-determined quantity of these substances, the appropriate statutory range should be that under section 841(b)(1)(C). *See United States v. Keeling*, 235 F.3d 533 (10th Cir. 2000); *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000). The decision below is in conflict with these circuit opinions, which justifies certiorari review.

In light of *Apprendi*, any assessment of facts that increases the prescribed range of penalties to which a criminal defendant is exposed invokes the full range of constitutional protections required for elements of the crime. That includes the right to trial by jury, as *Ring* makes abundantly clear.[5] It is no longer possible that drug weight is merely a sentencing factor and that a finding of an amount of powder exposing a defendant to a sentence of more than twenty years can be accomplished unless the amount is alleged in the indictment and found beyond a reasonable doubt.

To determine whether serious questions exist about the constitutionality of a criminal statute, this Court's decisions instruct the lower courts to first determine whether Congress intended to make a fact to be proved an element or a sentencing factor. Federal crimes are creatures of statute, and the question of whether facts are elements or sentencing factors is therefore a matter of Congressional intent. Courts should use the traditional tools of statutory

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[5] Since *Ring* was decided after the decision below, it is appropriate to remand the matter for further proceedings in light of *Ring*. *See Allen v. United States*, 122 S.Ct. 2653 (2202)(remanding federal conviction for reconsideration in light of *Ring* where element neither alleged in indictment nor submitted to jury).

construction, such as the statute's language, structure, subject matter, context and history. *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998). In deciding that *Apprendi* compels the conclusion that drug quantity and type are to be treated as elements of separate, aggravated drug offenses, the Fourth Circuit has interpreted *Apprendi* to require the abandonment of longstanding precedent holding, as a matter of statutory interpretation, that drug quantity is to be treated as a sentencing factor. *Promise*, 255 F.3d at 156-57. Although statutes should be construed to avoid constitutional questions, this principle does not mean the courts may essentially rewrite language used by the legislature. Any other conclusion infringes upon the powers constitutionally vested in the legislature. *United States v. Albertini*, 472 U.S. 675, 68 (1985). Unless this Court reviews this issue, the same problem will recur regarding section 841 and other criminal statutes with similar enhancement provisions.[6]

The constitutional question presented is also in need of an answer, since *Jones* and *Apprendi* have cast substantial doubt on the legislature's power to define sentencing factors that increase the applicable range of punishment. While the state has the power, within certain unspecified limits, to identify facts as sentencing factors, *McMillan v. Pennsylvania*,

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[6] The answer to this question will not only determine the constitutionality of the enhanced penalties in section 841, but may also affect the validity of determinate sentencing schemes in use in state and federal courts. *Apprendi* itself shows the importance of this question. While the *Apprendi* majority described the rights at issue as those of "surpassing importance," Justice O'Connor expressed her concern that the constitutional principle underlying the holding could "have the effect of invalidating significant sentencing reform accomplished at the federal and state levels over the past three decades." *Apprendi*, 530 U.S. at 549 (O'Connor, J., dissenting). The rights at stake, and their consequences for the functioning of the criminal justice system as it exists today, are important.

477 U.S. 79, 86 (1986), *Jones* began to define those limits when it recognized there is a serious question of when judicial fact-finding by a preponderance may support the application of a provision that increases the potential severity of the penalty for a variant of a given crime. *Jones*, 526 U.S. at 242-43. *Apprendi* itself cast doubt on the future of *McMillan*.

> The principal dissent accuses us of today "overruling *McMillan*." *Post* at 2385-2386. We do not overrule *McMillan*. We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict- - a limitation identified in the *McMillan* opinion itself. Conscious of the likelihood that legislative decisions may have been made in reliance on *McMillan*, we reserve for another day the question of whether *stare decisis* considerations preclude reconsideration of its narrower holding.

Apprendi, 530 U.S. at 487 n.13.

To add to this uncertainty, Justice Thomas concurred in *Apprendi* by announcing that his vote approving the use of recidivism as a sentencing factor in *Almendarez-Torres* was incorrect. He found no historical basis for treating as a non-element a fact that by law sets or increases punishment, including the mandatory minimum sentencing factor approved in *McMillan*. *Apprendi*, 530 U.S. at 498-523 (Thomas, J., concurring).

The penalty structure in section 841 presents an opportunity to clarify the principle of linkage between verdict and judgment emphasized in *Apprendi*, and formalized in *Ring*. *Apprendi* addressed the constitutionality

of punishment imposed via a statute altogether separate from the offense of conviction. Section 841 presents even more dramatic ranges of punishment, based on specific factors, within the statute of conviction. Surely there are constitutional limits to the legislature's ability simply to define a crime generally and then establish penalties ranging from a probationary sentence to life in prison (or even death) based only on facts neither submitted to the jury nor proved beyond a reasonable doubt. "One can imagine in the limit replacing the separate statutes for assault and murder by a single statute in which the violator would be punished by probation if he committed an assault that caused no injury at all and by death if the assault consisted in the intentional killing of the victim." *United States v. Jackson*, 207 F.3d 910, 920 (7th Cir.), *vacated in part*, 531 U.S. 953 (2000).

While *Apprendi* recognized that the doubling of the maximum sentence (from 10 to 20 years) based on judicial factfinding was a problem of constitutional dimension, the sentencing judge's drug quantity finding here raised the applicable maximum sentence from twenty years to life imprisonment and increased Daniels' actual sentence by nearly five years above the otherwise applicable maximum sentence.[7] Drug quantity drove the sentencing decision. It was not submitted to Daniels' jury; it was not proved beyond a reasonable doubt. Yet it resulted in a nearly five-year increase in the punishment he received. The constitutional issue is thus squarely presented.

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[7] Nor can the constitutional issue be avoided through the tools of statutory analysis, as it was in *Jones* and *Castillo*. In those cases, the statutes involved were ambiguous, and it was at least arguable that the factors involved ("serious bodily injury" in *Jones* and the use of a "machinegun" in *Castillo*) were intended, as a matter of statutory construction, to be elements of the offense.

Even among the circuits which have upheld the constitutionality of the statute, *see, e.g., United States v. Slaughter*, 238 F.3d 580, 582 (5th Cir. 2001); *United States v. Brough*, 243 F.3d 1078, 1080 (7th Cir. 2001); *United States v. Cernobyl*, 255 F.3d 1215, 1219 (10th Cir. 2001); *United States v. Candelario*, 240 F.3d 1300, 1311 n.16 (11th Cir. 2001), wide disparity exists as to the applicability to section 841 of the portion of the *Apprendi* decision which held that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 490. The Seventh Circuit held *Apprendi* did not render section 841 unconstitutional on its face because this provision is silent as to whether drug quantity is an element or a sentencing factor. *Brough*, 243 F.3d at 1079. ("But the statute does not say who makes the findings or which party bears what burden of persuasion. Instead, the law attaches effects to facts, leaving it to the judiciary to sort out who determines the facts, under what burden."). On the other hand, the Fifth Circuit upheld the enhanced penalties in section 841 on the questionable basis that the *Apprendi* decision involved New Jersey state statutes and made no reference to provisions of the United States Code. *Slaughter*, 238 F.3d at 582. Then the Tenth Circuit found the question of what Congress intended to remove from the jury's consideration is now irrelevant, and therefore section 841 is constitutional, because *Apprendi* compels the courts to "submit to a jury questions of fact that may increase a defendant's exposure to penalties regardless of whether that fact is labeled an element or a sentencing factor." *Cernobyl*, 255 F.3d at 1219. Thus, the Seventh Circuit found that Congress left it up to the courts to decide whether to treat drug quantity and type as elements or sentencing factors, the Fifth Circuit found that the above-quoted portion of the *Apprendi* decision does not apply to the United States Code, and the Tenth Circuit used

Apprendi's requirement of allegation and proof of drug quantity to circumvent its underlying principle that constitutional limits exist to the legislature's ability to create sentencing factors.[8] The apparent agreement among the circuits is illusory, as it is an agreement in result only; substantial and constitutionally significant disagreement lurks under the surface of the holdings. These courts need direction from this Court, and this case provides the opportunity.

Unquestionably, *Jones*, *Apprendi*, and *Ring* enunciate an important principle regarding the jury trial right of the Sixth Amendment. The circuits have struggled in applying this constitutional guarantee to drug prosecutions under 21 U.S.C. §841. In addition to the application of these cases to section 841 generally, the circuits are also split on the question of whether an objection to drug quantity at sentencing preserves the issue for appeal so that review is de novo rather than for plain error, as the court below believed. *See United States v. Woodruff*, 296 F.3d 1041,1045-46 (11th Cir. 2002)(applying de novo review where objection raised at sentencing).

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8 The Fourth Circuit in *Promise* essentially ducked the issue through its plain error analysis, refusing to notice the error through the exercise of its "discretion." Although the *Promise* majority held that "in order to authorize the imposition of sentence exceeding the maximum allowable without a jury finding of a specific threshold drug quantity, the specific threshold quantity must be treated as an element of an aggravated drug trafficking offense," 255 F.3d at 156-57, three judges agreed his sentence exceeded the maximum for the offense the indictment alleged but nonetheless declined to correct the error. Under plain error review, these judges agreed the trial court committed error, the error was plain, and it affected the substantial rights of someone in Daniels' situation, but they declined to notice the error as a discretionary matter.

This Court should grant certiorari to review these efforts and resolve the disagreements among the circuits as to how these cases impact this statute.[9]

CONCLUSION

For the reasons stated herein, Joseph Daniels respectfully requests that a petition for a writ of certiorari be granted, the judgment be vacated, and the matter remanded in light of *Ring*. In the alternative, he requests that this Court make a plenary review to resolve the splits among the circuits on the issues.

RESPECTFULLY submitted this the 17th day of October 2002.

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[9] This Court can also resolve an emerging dispute about application of the plain error standard. The Second and Fourth Circuits disagree about the extent of a reviewing court's discretion not to review an acknowledged constitutional error that affected a defendant's substantial rights depending on the evidence of drug quantity presented at trial. *Compare Doe*, 297 F.3d at 91-93 (noticing error and granting relief where quantity disputed by defendant), *with United States v. Carter*, 300 F.3d 415, 429-30 (4th Cir. 2002)(declining to notice error due to evidence of drug quantity).

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 99-4449

JOSEPH DANIELS, a/k/a Lil Hawk,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Greenville.
Malcolm J. Howard, District Judge
(CR-98-23-H)

Argued: April 3, 2002
Decided: June 21, 2002
[Entered: June 21, 2002]

Before WILKINSON, Chief Judge, WIDENER, Circuit Judge, and Walter K. STAPLETON, Senior Circuit Judge of the United States Court of Appeals for the Third Circuit, sitting by designation.

Affirmed by unpublished opinion. Judge Stapleton wrote the opinion, in which Chief Judge Wilkinson and Judge Widener joined.

COUNSEL

ARGUED: Milton Gordon Widenhouse, Jr., RUDOLF, MAHER, WIDENHOUSE & FIALKO, Chapel Hill, North Carolina, for Appellant. Jane J. Jackson, Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

ON BRIEF: Janice McKenzie Cole, United States Attorney, Anne M. Hayes, Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

STAPLETON, Senior Circuit Judge:

Appellant, Joseph Daniels, was convicted of conspiring to possess with the intent to distribute, and with distributing, cocaine and crack cocaine. *See* 21 U.S.C. § 841(a)(1); 21 U.S.C. § 846. He was sentenced to 292 months in prison and five years of supervised release. Three issues are raised on appeal.

Daniels first challenges the admission at trial of evidence about an episode that led to his arrest in Atlanta, Georgia in 1993. This evidence tended to show that Daniels and three other individuals had arranged to purchase a kilogram of crack cocaine from an undercover agent.

Daniels argues that this evidence was inadmissible under Federal Rule of Evidence 404(b). The Government counters that it was not evidence within the scope of Rule

404(b). Rather it was evidence of the charged conspiracy tending to show the commission of an overt act in furtherance of that conspiracy. We agree.

Evidence of wrongful acts that is probative of the crime charged does not fall within the limitations of Rule 404(b) and is admissible subject to other evidentiary constraints such as relevancy. *United States v. Colkley*, 899 F.2d 297, 303 (4th Cir. 1990). If a prior act is relevant to prove involvement in a charged conspiracy and is not offered to prove character, Rule 404(b) is not applicable and the prior act is admissible. *United States v. Dozie*, 27 F.3d 95, 97 (4th Cir. 1994).

Under Federal Rule of Evidence 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence more or less probable than it would be without the evidence." The evidence Daniels here challenges tended to make it more probable that Daniels went to Atlanta to secure crack cocaine for distribution by the charged conspiracy in North Carolina.

The arrest occurred on February 12, 1993, which is within the dates of the charged conspiracy, January 1, 1992 to July 28, 1998. Lonnie Earl Crandall, Daniels's alleged co-conspirator, testified that Daniels suggested that they go together to Atlanta to secure drugs. Because Crandall was unable to go, Daniels went with the three individuals with whom he was arrested. When Daniels returned to North Carolina, he told Crandall that he had been arrested before he was able to buy the crack cocaine. The undercover agent involved in the transaction testified that Daniels was present when it took place and that one of the four individuals arrested told him that Daniels was a knowing participant in the attempted purchase. Daniels also told Curtis Guilford, another co-conspirator, that he was going to Atlanta to get drugs. There was also evidence that Daniels, around the

time of his arrest in Atlanta, began looking for drug sources for the conspiracy outside of North Carolina. After the Atlanta arrests, Daniels began sending people to New York to purchase drugs.

Daniels argues that the Atlanta transaction did not have anything to do with the conspiracy charge between Daniels and Crandall and places great weight on his own trial testimony and that of another participant in the transaction that, while present, Daniels had no knowledge that a drug transaction was about to occur. This was, of course, an appropriate argument for Daniels to make to the jury, but the jury was not compelled to accept it. The arrest remained relevant despite the evidence Daniels stressed and the jury was entitled to conclude, based on that evidence, that the Atlanta transaction was a part of the charged conspiracy.

Daniels next argues that the jury's verdict was ambiguous as to which drug, crack cocaine or powder cocaine, was the object of the conspiracy. As a result of this alleged ambiguity, Daniels contends that he must be sentenced based on the drug carrying the lower statutory penalty, which is powder cocaine. He bases his argument on the Fourth Circuit's holdings in *United States v. Rhynes*, 196 F.3d 207 (4th Cir. 1999), *vacated in part on other grounds*, 218 F.3d 310 (4th Cir. 2000), *United States v. Quicksey*, 525 F.2d 337 (4th Cir. 1975), and *United States v. Lewis*, 2000 WL 1390065 (4th Cir. 2000).

This claim is reviewed for plain error because Daniels did not assert it in the District Court. *United States v. Bowens*, 224 F.3d 302, 314-15 (4th Cir. 2000). Under this standard, Daniels must show (1) "an `error,' (2) that is `plain' and, (3) that `affects[s] substantial rights.'" *Johnson v. United States*, 520 U.S. 461, 466-67 (1997) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)). "Moreover, Rule

52(b) leaves the decision to correct the forfeited error within the sound discretion of the Court of Appeals, and the court should not exercise that discretion unless the error seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings." *Id.* at 467.

The indictment charged Daniels with conspiracy to possess with the intent to distribute, and with distributing, cocaine *and* crack cocaine. Accordingly, the District Court instructed the jury that Daniels was charged in the indictment with conspiring to possess with intent to distribute, and with distributing, both cocaine *and* crack cocaine. It further charged the jury that in order to find Daniels guilty it must find beyond a reasonable doubt "that two or more persons in some way or manner came to a mutual understanding to try to accomplish a common and unlawful plan *as charged in the indictment* . . . ." JA 1153.

The jury's verdict was not ambiguous with regard to which drug was the object of the conspiracy. As in *United States v. Cotton*, 261 F.3d 397 (4th Cir. 2001), *rev'd on other grounds*, 122 S.Ct. 1781 (2002), it was clear from the indictment and the jury instructions that the charged conspiracy involved plans to possess and distribute both forms of cocaine. The Court instructed the jury in unambiguous terms that a conspiracy conviction could be based only upon a finding that there was a conspiracy to distribute both powder cocaine and crack cocaine, *see Cotton*, 261 F.3d at 402-03, and the evidence was sufficient to support a finding that Daniels conspired to distribute both. There is no reason to believe that the jury failed to follow the instructions it was given. The jury's verdict of guilty thus clearly evidences a conclusion beyond a reasonable doubt that both powder cocaine and
crack cocaine were objects of the conspiracy.

This case is distinguishable from *Rhynes*. In *Rhynes*, the jury was instructed that it could find the defendant guilty if it found that the defendant had conspired "to distribute or possess with intent to distribute heroin, *or* cocaine, *or* cocaine base *or* marijuana." 196 F.3d at 237. Because the different drugs were connected in the disjunctive, it was impossible for the court to determine on which statutory object or objects the jury's verdict was based.

Daniels's final argument concerns his sentence of 292 months. The maximum sentence for the distribution of an unspecified quantity of cocaine or cocaine base is 240 months. 21 U.S.C. § 841(b)(1)(C). The jury was not asked to make a finding as to the amount of powder or crack cocaine involved in the conspiracy. Daniels was sentenced, however, for an aggravated drug trafficking offense based upon the trial judge's finding that at least 1.5 kilograms of crack were distributed in the course of the conspiracy. As a result, Daniels insists that his sentence is invalid under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This argument was not raised in the District Court, and therefore, must meet the plain error standard we have previously discussed.

The Government concedes that under *Apprendi* the District Court erred by sentencing Daniels to more than 240 months in the absence of a jury determination that his offense involved the threshold amount necessary to support such a sentence. It further concedes that this error is "plain" in light of *Apprendi*. Relying on the Supreme Court's recent decision in *United States v. Cotton*, 122 S.Ct. 1781 (2002), however, the government maintains that no relief is appropriate because the error did not seriously affect the fairness, integrity or public reputation of the proceedings.

In *Cotton*, the Court was also faced with a situation in which the trial court, without a contemporaneous objection, had imposed drug conspiracy sentences of over 240 months without a jury finding concerning the quantity of the drugs involved. When applying the plain error standard, the Court declined to address whether such an error affected the substantial rights of the defendants. Rather, the Court held that even if the defendant's substantial rights are affected, such an error does not seriously affect the fairness, integrity or public reputation of judicial proceedings so long as the evidence of the requisite drug quantity is "overwhelming" and "essentially uncontroverted." In such a situation, "[t]he real threat . . . to the `fairness, integrity, and public reputation of judicial proceedings' would be if [defendants], despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial offenses because of an error that was never objected to at trial." *Id.* at 1787.

The evidence regarding the quantity of drugs involved in this six and one-half year conspiracy, like that in *Cotton*, was overwhelming and essentially uncontroverted and supports Daniels's sentence. Lonnie Earl Crandall testified that Fruit (or Tutti) made numerous trips to New York to buy crack cocaine for himself and Daniels. On each of these trips, Fruit would buy half a kilogram or a full kilogram of crack cocaine. Crandall and Milton Jones brought back from New York two kilograms of crack cocaine on one trip alone. Jones was arrested on another occasion with two kilograms of cocaine and crack cocaine that he was transporting for Daniels. Terrell Sneed also testified that he made two trips to New York for Daniels. On each of these trips he transported 250 grams of cocaine and 250 grams of crack.

Based on this uncontroverted evidence, the presentence investigation report recommended a base level of 38, observing that the "information presented by the government at trial, and affirmed by the jury's verdict of guilty, establishes that the defendant should be held accountable for the distribution of well in excess of 1.5 kilograms of crack cocaine." App. 1199. Significantly, while Daniels's Objections to Presentence Investigation Report objected to being held accountable for "in excess of 1.5 kilograms of crack cocaine," he did not object to being held accountable for 1.5 kilograms of crack cocaine, the amount necessary to support his sentence. As we have noted, the trial judge, at the sentencing hearing, found that the conspiracy had involved at least 1.5 kilograms of crack. He went on to note, however, that the evidence would support a finding of far in excess of that amount.

The absence of a jury finding that Daniels's conspiracy involved at least 1.5 kilograms of crack cocaine does not impair the fairness, integrity or public reputation of the proceeding that we here review. To the contrary, as in *Cotton*, the record here is such that vacating his sentence because of the absence of such a finding would pose a "real threat . . . to the `fairness, integrity, and public reputation of'" those proceedings.

Daniels's conviction and sentence will be affirmed.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED: July 19, 2002

No. 99-4449
CR-98-23-H

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH DANIELS, a/k/a Lil Hawk,
Defendant-Appellant.

On Petition for Rehearing and Rehearing En Banc

Appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court
/s/ Patricia S. Connor
CLERK

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

NO. 4:98-CR-23-1-H4
NO. 4:98-CR-23-2-H4

[Entered: July 21, 1998]

UNITED STATES OF AMERICA	:
v.	:
JOSEPH DANIELS	:
a/k/a Lil Hawk	:
LONNIE EARL CRANDALL	:

The Grand Jury Charges that:

COUNT ONE

From on or about January 1, 1992, the exact date being unknown to the grand jury, and continuing until the present in the Eastern District of North Carolina, and elsewhere, the defendants, JOSEPH DANIELS a/k/a Lil Hawk, and LONNIE EARL CRANDALL did knowingly, and intentionally combine, conspire, confederate, agree and have tacit understanding with each other and various other persons both known and unknown to the Grand Jury, to commit an offense, in violation of the provisions of Title 21, United States Code, Section 841(a)(1), to knowingly, intentionally and unlawfully possess with the intent to distribute and distribute cocaine and crack cocaine, Schedule II narcotic controlled substance.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendant and certain unindicted co-conspirators performed overt acts in the Eastern District of North Carolina and elsewhere, including the following:

1. Beginning in 1992, JOE DANIELS, a/k/a Lil Hawk, began distributing crack cocaine to Daryl Bernard Tyson
2. During 1992 and 1993, JOE DANIELS, a/k/a Lil Hawk, and Lonnie Earl Crandall received large amounts of crack cocaine.
3. On or about December 8, 1993, LONNIE EARL CRANDALL possessed crack cocaine.
4. During 1994, JOE DANIELS, a/k/a Lil Hawk, and LONNIE EARL CRANDALL distributed crack cocaine to Sylvanus Little.
5. During the summer of 1995, LONNIE EARL CRANDALL distributed two kilograms of crack cocaine to Zack Hinton.
6. Beginning in August of 1996, JOE DANIELS, a/k/a Lil Hawk, and LONNIE EARL CRANDALL directed Milton Jones to travel to New York to pick up their cocaine.
7. During August of 1996, JOE DANIELS, a/k/a Lil Hawk, and LONNIE EARL CRANDALL received a shipment of crack cocaine from New York.
8. In late summer of 1996, JOE DANIELS, a/k/a Lil Hawk, and LONNIE EARL CRANDALL directed Milton Jones to travel to New York to pick up another shipment of cocaine.

9. On or about October 2, 1996, Milton Jones possessed two kilograms of cocaine and crack cocaine that he was delivering to JOE DANIELS, a/k/a Lil Hawk, and LONNIE EARL CRANDALL.

10. On or about February 5, 1998, LONNIE EARL CRANDALL distributed crack cocaine.

11. On or about April 8, 1998, LONNIE EARL CRANDALL distributed crack cocaine.

All in violation of Title 21 United States Code, Section 846.

COUNT TWO

On or about February 5, 1998, in the Eastern District of North Carolina, the defendant LONNIE EARL CRANDALL, did knowingly, intentionally and unlawfully distribute cocaine, a Schedule II narcotic controlled substance, in violation of 21 United States Code, Section 841(a)(1).

COUNT THREE

On or about April 8, 1998, in the Eastern District of North Carolina, the defendant LONNIE EARL CRANDALL, did knowingly, intentionally and unlawfully distribute cocaine, a Schedule II narcotic controlled substance, in violation of 21 United States Code, Section 841(a)(1).

A TRUE BILL

\s_____

FORMAN

DATE: 7/21/98

\s\Janice McKenzie Cole

JANICE MCKENZIE COLE

United States Attorney

JURY CHARGE

THE COURT: All right. Members of the Jury, it is now my duty to instruct you on the rules of law that you must follow and apply in deciding this case and when I have finished, you will go to your jury room and being your discussions, what we call your deliberations. You do not need to take any notes during my charge, in fact I prefer you do not take any notes because I will give you a verbatim copy of my charge to have in the jury room for any further reference you might need to make. It will be your duty to decide whether the Government has proved beyond a reasonable doubt the specific facts necessary to find the defendant, Joseph Daniels, guilty of the crime charged in this indictment. During the course of this trial I may have asked questions or made statement to witnesses. Do not consider my remarks in any way as indicating that I may have an opinion as to the facts in this case. Nothing that I have said or done should lead you to believe I have any opinion about the facts or should be taken by you as - in any way as indicating what your verdict should be. That is solely for you to determine. Now you must make your decision only on the basis of the testimony and other evidence presented here during this trial and you must be influenced in any way either by sympathy or prejudice for or against the defendant or the Government. You must also follow the law as I explain it to you whether you agree with that law or not and you must follow all of the instructions as a whole. You may not single out or disregard any of my instructions on the law. The indictment or formal charge against any defendant is not evidence of guilt. Indeed, the defendant Joseph Daniels, is presumed by the law to be innocent. The law does not require a defendant to prove his innocence or produce any evidence at all. The Government has the burden of proving a defendant guilty beyond a reasonable doubt and if it fails to do so, you must find the defendant not guilty.

Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt to proved beyond all possible doubt. It is only required hat the Government's proof exclude any reasonable doubt concerning the defendant's guilt. A reasonable double is a real doubt. Based upon reason and common sense after careful and impartial consideration of all of the evidence in the case. As I stated earlier, you must consider only the evidence that has been admitted in this case. The term evidence includes the testimony of the witnesses and the exhibits admitted in to the record. Remember that anything the lawyers say is not evidence - in the case. It is your own recollection and your own interpretation of the evidence that controls. In considering the evidence, you may make deductions and reach conclusions which reason and common sense lad you to make and you should not be concerned about whether the evidence is direct of circumstantial. Direct evidence is the testimony of one who asserts actual knowledge of a fact such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact or facts. The law makes no distinction between the weight you may give to either direct or circumstantial evidence. Now in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say and how important that testimony was. In making that decision, you may believe or disbelieve any witness I whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling. You may decide that the testimony of a smaller number of witnesses concerning any fact in dispute is more believable than the testimony of a larger number of witnesses to the contrary. In deciding whether you believe or do not believe any witness, I suggest you ask yourself a few questions. Did the person impress you as one who was telling the truth? Second, did

he or she have a particular reason not to tell the truth? Did he or she have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and the ability to observe accurately the things he or she testified about and did he or she appear to understand the questions clearly, answer them directly and finally, did the witnesses testimony differ from the testimony of other witnesses? You should also ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact or whether there was evidence that at some other time the witness said or did something or failed to say or do something which was different form the testimony he or she gave before you during this trial. You should keep in mind, of course, that a simple mistake by a witness does not mean that the witness was not telling the truth as he or she remembers it because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood and that may depend on whether it has to do with an important fact or with only unimportant detail. As sated at the beginning this case, a defendant has a right not to testify. If a defendant does testify however, you should decide whether you believe his testimony. The testimony of an alleged accomplish and the testimony of one who provides evidence against the defendant is an informer for pay or for immunity from punishment or for personal advantage or vindication must always be examined and weighed by the jury with greater care and caution than the testimony of an ordinary witness. You, the jury, may - - must decide whether that type witness' testimony has been affected by any of these circumstances or by the witnesses interest in the outcome of the case or by prejudice against the defendant or by the benefits that the witness has received, either financially or as a result of being

immunized from prosecution in some fashion. You should keep in mind that such testimony is always to be received with caution and weighed with great care. You should never convict any defendant upon the unsupported testimony of such a witness unless you believe that testimony beyond a reasonable doubt. Also, I instruct you that a witness' prior conviction is a factor you may consider in deciding whether to believe a witness, but it does not necessarily destroy the witness' credibility. The prior conviction of a witness has been brought to your attention only because you may wish to consider it when you decide whether you believe the witness' testimony. It is not evidence of anything else. In this case, the Government called as one of its witnesses a person named as a co-defendant in this particular indictment, to wit, Lonnie Earl Crandall, with whom the Government has entered into a plea agreement providing for the dismissal of some charges. Such plea-bargaining as it is called, ha been approved as lawful and proper and it expressly provided for in this Court's rules. However, a witness who hopes to gain more favorable treatment in his or her own case may have a reason to make a false statement because he wants to strike a good bargain with the Government. So while a witness of that kind may be entirely truthful when testifying, you should consider his testimony with more caution than the testimony of other witnesses and of course, the fact that a witness has plead guilty to a crime charged is not evidence in and of itself of the guilt of any other person on any other bill of indictment. You've heard the testimony of law enforcement officials. The fact that a witness may be employed by the federal, state or local government as a law enforcement official does not mean that his or her testimony is necessarily deserving of more or less consideration or greater or lesser weight than that of an ordinary witness. At the same time, it's quite legitimate for defense counsel to try to attack the credibility of a law enforcement witness on the grounds that his testimony or

her testimony may be colored by a personal or a professional interest in the outcome of the case. It's your decision. After reviewing all of the evidence whether or accept the testimony of the law enforcement witness and to give to that testimony whatever weight, if any, you find it deserves. In this case, as you know, the indictment charges one offense called count one against this defendant. I'm not going to read the indictment to you but you will have a copy of it for study during your deliberations. I will now explain the applicable law as to count one. Count one of this indictment charges that from on or about January 1, 1992, and continuing until the present time, that is the time of the indictment which was July 21, 1998, in the Eastern District of North Carolina and elsewhere, the defendant, Joseph Daniels, also known as Little Hawk and another person, specifically Crandall in this particular indictment did knowingly, intentionally and unlawfully combine, conspire, confederate and agree with each other and with other persons, both known and unknown to the grand jury to knowingly, intentionally and unlawfully possess with the intent to distribute and distribute cocaine and crack cocaine, a Schedule II narcotic controlled substance in violation of Title 21, United States Code, Section 841A1. Now Title 21, United States Code, Section 846 makes it a separate federal crime for anyone to conspire or agree with someone else to do something which is actually carried out would be a violation of Title 21 Section 841A1. Now the section 8411A1 is the possession with intent to distribute. Section 846 is the conspiracy to do that. You are charged with deciding the guilt or innocence in this case under 846. Section 841 makes it a crime for anyone to knowingly distribute or possess with the intent to distribute a controlled substance. Now I instruct you, I tell you that cocaine and crack cocaine are controlled substances within the meaning of the law. Under the law, a conspiracy is an agreement or a kind of a partnership in a criminal purpose in which each member becomes the agent or partner of

every other member. In order to establish a conspiracy offense, it is not necessary for the Government to prove that all of the people named in the indictment were members of the scheme or that those who were members entered into any formal type of agreement. Also because the essence of the conspiracy offence is the making of the scheme itself, it is not necessary for the government to prove that that conspirators actually succeeded in accomplishing their unlawful plan. What the evidence must show beyond a reasonable doubt is the following two things. One, that 2 or more persons in some way or manner came to a mutual understanding to try to accomplish a common and unlawful plan as charged in the indictment. And second, that the defendant knowingly and willfully became a member of such conspiracy. A person may become a member of a conspiracy without full knowledge of all the details of the unlawful scheme or the names and identities of all the other alleged conspirators. So if a defendant has an understanding of the unlawful nature of a plan and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict for conspiracy even though he may have played only a minor part. Of course, mere presence at the scene of a transaction or event or the mere fact that certain persons may have associated with each other and may have assembled together and discussed common aims and interests, does not necessarily establish proof of a conspiracy. Also a person who has no knowledge of a conspiracy but who happens to act in a way which it advances some purpose of a conspiracy does not thereby become a conspirator. It must also be noted that one does not automatically become a conspirator by being a buyer or seller of drugs. A buyer/seller relationship standing alone, does not establish the existence of a conspiracy. While a buyer/seller relationship coupled with the involvement of substantial quantity of drugs may support the inference of the existence of a conspiracy, the burden is still upon the

Government by proof beyond a reasonable doubt to show that the defendant knowingly entered the conspiratorial agreement alleged in the indictment to distribute and possess with the intent to distribute illegal drugs. That concludes the specific portion of the explanation of the charge in count one and the only count applying to this defendant in this bill of indictment. You will note that the indictment charges that the offense was committed on or about or in or about a certain date. The Government does not have to prove with certainty the exact date of an alleged offense. It's sufficient if the Government proves beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged. The word knowingly as that tern has been used from time to time in these instructions means that the act was done voluntarily and intentionally and not because of a mistake or accident or other innocent reason. The word willfully as that term has been used from time to time means that the act was committed voluntarily and purposefully with a specific intent to do something the law forbids, that is with bad purpose either to disobey or disregard the law. The law recognizes several kinds of possession. Possession with intent to distribute, possession - - a person may have actual or constructive possession. A person may also have sole or joint possession. A person who has direct physical control of something on or about his person then is in actual possession of it. A person who is not an actual possession but who has both the power and the intention to later take control over something either alone or together with someone else is in construction possessive possession. If one person alone has possession of something, possession is sole s-o-l-e. If two or more persons share possession, possession is joint. Now, whenever the word possession has been used in these instructions, it includes all of these actual as well as constructive and sole as well as joint. The word distribution simply means to transfer possession or control of a substance to another person. You are to

consider only the evidence in the case. I'm getting close to the end now, so bear with me. But in consideration of the evidence, you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see in here as the witnesses testify. You are permitted to draw from the facts which you find have been proven such reasonable inferences as seen justified in the light of your experiences. Inferences are deductions or conclusions which reason and common sense lead the jury to draw from the facts established I the case, Members of the Jury, you are here to determine from the evidence in this case, whether Joseph Daniels is guilty or not guilty. The defendant is on trial only for the specific alleged offense in count one of this indictment. Also, the question of punishment should never be considered by you in any way in deciding the guilt or innocence. If the defendant is convicted, the matter of punishment is solely for me to determine. Any verdict you reach in the jury room whether guilty or not guilty must be unanimous. That is, all 12 of you must agree. Your deliberations will be secret. You will never have to explain your verdict to anyone. It is your duty as jurors to discuss the case with one another in an effort to reach a conclusion. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members and while you are discussing the case, do not hesitate to re-examine your own opinion, change your mind if you become convinced that you are wring, but don't give up your honest belief solely because the others think differently or merely to get the case over with. Remember that in a very real way, you are judges. Judges of the facts. Your only interest is to seek the truth from the evidence in this case. When you go to your jury room, the first thing I want you to do is select from your group one person to act as your chairperson. This chairperson will then preside over your deliberations in your jury room and this chairperson will speak for you when you have completed your deliberations here in this

courtroom. A form verdict has been prepared for your convenience. You will take this verdict form to the jury room with you and when you have reached a unanimous agreement, you will have the foreperson or chairperson fill the verdict form out, date it and sign it, and then notify the Marshall, who will always be right outside your door that you have reached a verdict. If you should desire to communicate with me at any time, please write down your message on a piece of paper and pass the not to the Marshal who will bring it to my attention and then I will respond as promptly as possible either in writing or by having you return to this courtroom so I may address you orally, I caution you, however, with a regard to any message or question you might ever send that you should never tell me in a numerical division at any time amongst you if such there be. I also advise you that you may call your own recesses during the course of your deliberation if you desire to do so. If you call a recess and one or more of you are either in a bathroom or smoking or whatever, you cannot - - the other cannot talk about the case. You can only talk about the case when all 12 people are there listening and hearing. Mr. Riggans, do you have any possessions left in the jury room? All right, if you'll have a seat, Sir, right there beside the Marshal, you and I will visit in just a moment. We are glad no one else became ill and you didn't have to be used. I'll talk to you in a moment. Members of the Jury, that completes the charge in this case. You may now take your notebooks in your hand and go to your jury room and shortly after you arrive there, within - - while your door is still open, Madam Clerk and the Marshal will bring all of the evidence that has been admitted in the case in a box into your jury room. We will not send the white powdered substance that's on the front of the Government's table unless you want that. If you want it in the jury room, I'll send it in there. I'm not worried about you - - well, we just don't do that unless you want it. Now I recognize the hour. At about a quarter to

12, I'm going to send you a note to see if you want me to have your lunch brought in or are you about to reach a verdict. If you want your lunch brought in, then I'll have your lunch brought in at the Government expense. Everyone else remain seated. Members of the Jury, you may go to your jury room. Madam Clerk.

(Jury out to commence deliberations)

Section 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving -

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of -

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- (1- (2-phenylethyl) -4-piperidinyl) propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-pheny propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of

imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction,

impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving -

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of -

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances

referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- (1- (2-phenylethyl) -4-piperidinyl) propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-pheny propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily

injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person

sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment.

Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and

shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in

accordance with the provisions of title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed -

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use -

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water, shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(7) Penalties for distribution. -

(A) In general. - Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18.

(B) Definition. - For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Repealed. Pub. L. 98-473, title II, Sec. 224(a)(2), formerly Sec. 224(a)(6), Oct. 12, 1984, 98 Stat. 2030, as renumbered by Pub. L. 99-570, title I, Sec. 1005(a)(2), Oct. 27, 1986, 100 Stat. 3207-6

(d) Offenses involving listed chemicals

Any person who knowingly or intentionally -

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required; shall be fined in accordance with title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(e) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more

than 20 years and shall be fined not more than $20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(f) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(g) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under title 18 or imprisoned not more than one year, or both.